No. 80-921

In the Supreme Court of the United States

OCTOBER TERM, 1980

DOMINIC PHILLIP BROOKLIER AND
SAMUEL ORLANDO SCIORTINO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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In this petition following an interlocutory appeal pursuant to *Abney* v. *United States*, 431 U.S. 651 (1977), petitioners contend that their prosecution on one count of a 1979 indictment charging a substantive RICO offense[1] was barred by the Double Jeopardy Clause in light of their 1974 convictions on a RICO conspiracy count.

1. In 1974, petitioners were indicted in the United States District Court for the Central District of California on seven counts charging conspiracy to conduct an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(d) (Count I), conspiracy to obstruct interstate commerce by means of extortion, in violation of 18 U.S.C.

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[1]Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 *et seq.*

1951 (Count II), conspiracy to use extortionate means to collect an extension of credit, in violation of 18 U.S.C. 894 (Count III), obstruction of interstate commerce by means of extortion, in violation of 18 U.S.C. 1951 (Counts IV, V, VI), and devising a scheme to defraud and to obtain money by false pretenses, in violation of 18 U.S.C. 2314 (Count VII). Petitioners pleaded guilty to the RICO conspiracy charge (Count I), and the remaining six counts of the indictment were dismissed. Petitioner Brooklier was sentenced to 20 months' imprisonment, and petitioner Sciortino was sentenced to 15 months' imprisonment. No appeal was taken.

The RICO conspiracy count in the 1974 indictment charged that petitioners and 10 others were "associated with an enterprise * * * [under RICO], to wit, a group of individuals associated in fact to shakedown, extort, defraud and illegally collect money, property and gambling debts from persons engaged in legitimate and illegitimate enterprises * * *." The indictment further alleged that petitioners conspired to participate in the conduct of the affairs of this enterprise through a pattern of racketeering activity. Among the 54 overt acts charged in this count, four overt acts pertained to the extortion of money from bookmaker Sam Farkas in June 1973. This extortionate scheme was not charged in any of the substantive counts of the indictment.

2. In 1979, petitioners were indicted in the United States District Court for the Central District of California on four counts charging conspiracy to conduct an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(d) (Count I), conducting the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c) (Count II), obstructing interstate commerce by extortion, in violation of 18 U.S.C. 1951(a) (Count III), and using force to prevent Frank Bompensiero from com-

municating information concerning criminal offenses to the FBI, in violation of 18 U.S.C. 1510 (Count V).[2]

Prior to trial, petitioners moved to strike Count II of the 1979 indictment on the ground that the Double Jeopardy Clause prohibited prosecution on this charge in light of their convictions on Count I of the 1974 indictment. Count II of the 1979 indictment, charging a substantive RICO violation, named seven predicate acts of racketeering. Among those was the 1973 extortion of Sam Farkas, which had been referred to as an overt act in the RICO conspiracy count of the 1974 indictment. Petitioners alleged that because both the 1974 RICO conspiracy charge and the 1979 RICO substantive charge included the 1973 extortion of Sam Farkas, their convictions on the 1974 charge barred their prosecution on the 1979 charge. The district court denied petitioners' double-jeopardy motion. Petitioners took an immediate appeal from this ruling pursuant to *Abney* v. *United States*, *supra*, and the court of appeals affirmed (Pet. App. 1).[3]

3. On November 14, 1980, petitioners were convicted by a jury on Count II of the 1979 indictment. Petitioner Brooklier was also convicted on Count I. On December 5, 1980, Brooklier and Sciortino filed the instant petition for a writ of certiorari seeking review of the Ninth Circuit's disposition of their *Abney* appeal. Thereafter, Brooklier was sentenced to concurrent terms of four years' imprisonment on each count, and Sciortino was sentenced to four years' imprisonment and fined $25,000. On January 20, 1981,

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[2]The 1979 indictment was subsequently superseded by an identical indictment returned on May 15, 1980.

[3]On January 23, 1981, the court of appeals issued an opinion setting forth the reasons for its earlier order of affirmance. See No. 80-1455 (9th Cir.). A copy of this opinion was submitted to the Court by petitioners' letter of January 28, 1981, and their Supplemental Appendix to Petition for Writ of Certiorari (filed Feb. 4, 1981).

petitioners filed notices of appeal from the district court's final judgment of conviction and sentence. See Nos. 81-1045, 81-1046 (9th Cir.).

4. Review of petitioners' double-jeopardy claim would be inappropriate at this stage. The instant petition arises from the denial of a pretrial motion to dismiss Count II of the 1979 indictment, not from a final judgment of conviction. Although the district court's order denying the motion to dismiss was immediately appealable because petitioners invoked the protection of the Double Jeopardy Clause "against being twice put to *trial* for the same offense" (*Abney* v. *United States, supra*, 431 U.S. at 661), that rationale is no longer applicable in this case. Since the time their *Abney* appeal was filed and resolved against them by the court of appeals, petitioners have been tried, convicted, and sentenced. Accordingly, the *Abney* analysis allowing a pretrial appeal in order to avoid a second trial is inapposite here.

In its present posture, this case involves the question whether the Double Jeopardy Clause protects petitioners from being punished—not tried—on Count II of the 1979 indictment. As the Court recognized in *Abney* v. *United States*, *supra*, 431 U.S. at 660, this aspect of the protection afforded by the Double Jeopardy Clause "can be fully vindicated on an appeal following final judgment * * * ." Thus, once the trial has been completed, immediate review under *Abney* should not be available even in the court of appeals, and a fortiori not in this Court. Instead, recourse must be had to the customary appellate process by seeking review of the final judgment of conviction and sentence.

Indeed, petitioners have now filed notices of appeal from the final judgment of the district court. Adherence to the usual appellate procedure will enable the court of appeals, and eventually this Court, to consider all of petitioners' claims at one time rather than in a piecemeal fashion. See

Hamilton-Brown Shoe Co. v. *Wolf Brothers*, 240 U.S. 251, 257-258 (1916); cf. *Cobbledick* v. *United States*, 309 U.S. 323, 324-326 (1940). And, if petitioners prevail on some other ground in the court of appeals, it may never be necessary for this Court to pass upon their double-jeopardy contention.[4] In these circumstances, further review of the case at this juncture is unwarranted.[5]

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[4]We also note that petitioner Brooklier received concurrent sentences on Counts I and II. Thus, it may be unnecessary to consider his constitutional challenge to Count II. See *Andresen* v. *Maryland*, 427 U.S. 463, 469 n.4 (1976); *Barnes* v. *United States*, 412 U.S. 837, 848 n.16 (1973).

[5]In addition, petitioners' claim is without merit. "Traditionally the law has considered conspiracy and the completed substantive offense to be separate crimes." *Iannelli* v. *United States*, 420 U.S. 770, 777 (1975). Hence, the Double Jeopardy Clause does not bar successive prosecutions for the distinct offenses of conspiracy and the consummated crime.

Moreover, the matter common to both charges that is the basis for petitioners' double-jeopardy claim—the Farkas extortion in 1973—was merely an evidentiary means for the government to prove the charges against petitioners rather than an indispensable element of the offenses. Apart from the Farkas extortion, the 1974 RICO conspiracy count and the 1979 RICO substantive count involved completely unrelated transactions engaged in by entirely different people (except for petitioners themselves) during different time periods and with different victims. The 1974 RICO conspiracy charge concerned the illegal collection of gambling debts, while the 1979 RICO substantive charge principally pertained to the extortion of money from pornographers, and most of the predicate acts of racketeering in the 1979 RICO substantive count occurred after petitioners had served their sentences on the earlier conspiracy charge. Surely the Double Jeopardy Clause does not prohibit the government from using overlapping evidence at separate trials to prove quite distinct crimes.

Finally, even if petitioners' claim were correct, the proper remedy would be to strike the challenged portion of Count II of the 1979 indictment, not to dismiss the count in its entirety (and certainly not to bar trial on the other counts). As petitioners conceded in the court of appeals, nothing in the Double Jeopardy Clause prevents them from being charged on the " 'fresh' racketeering acts alleged in Count II" (Appellants' Supplemental Brief, at 7).

It is therefore respectfully submitted that the petition for a writ of ceritorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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